

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 14, 2008 Session

MARTA MOLCHKO MYERS v. PHILLIP DWIGHT MYERS

Appeal from the Circuit Court for Grundy County
No. 7168 Buddy D. Perry, Judge

No. M2007-01435-COA-R3-CV - Filed January 21, 2009

In this divorce action, Wife appeals the trial court's classification and division of the marital estate and the decision to not award her alimony. The principal marital asset is Husband's interest in the business known as Myers Trucking; however, it was disputed whether the business and the commercial trucks used in the business were solely owned by Husband or whether the business was a partnership in which he only had a 50% interest. It was also disputed whether many of the business' valuable assets were owned by his parents. The trial court awarded Myers Trucking to Husband and awarded Wife \$125,000 for her marital interest in the business without determining whether Husband solely owned the business or whether the business was a partnership equally owned by Husband and his father and without determining whether the business or the parents owned the trucks used in the business. We have determined the trial court failed to determine the ownership and value of the disputed assets and to value the marital property; therefore, the court could not have made an equitable distribution of the marital estate. We have also determined that the record is inadequate for us to determine these issues on appeal. Accordingly, we reverse the judgment of the trial court and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and WALTER J. KURTZ, SR. J., joined.

Robin L. Miller and R. Wayne Peters, Chattanooga, Tennessee, for the appellant, Marta Molchko Myers.

Randall W. Morrison, Tullahoma, Tennessee, for the appellee, Phillip Dwight Myers.

OPINION

Marta Molchko Myers (Wife) filed for divorce from Phillip Dwight Myers (Husband) on May 4, 2005. The parties had been married since February 1999, and have one child. On May 25, 2005, Husband timely filed an Answer and Counter-Complaint for divorce.

For purposes of this appeal, the ownership and value of the business known as Myers Trucking was the primary issue in dispute at the final hearing on January 16, 2007. There is conflicting testimony concerning the ownership of the business and the ownership of the trucks used in the business, which may or may not be significant assets of the business, depending on who owns the business and whether the business or others own the trucks used in the business. These issues are significant because the gross income of Myers Trucking in 2006 was \$4.8 million.

Husband testified that Myers Trucking was a joint venture owned by him and his father equally. He also testified that equipment and other financial loans were obtained in Husband's name and his father's and mother's names. Husband, however, admitted that a partnership tax return was never filed and that he claimed all income from Myers Trucking on his personal income tax returns.

Husband's father, Dwight Myers, testified that he and his son started Myers Trucking in 1999 on a 50-50 basis, Myers Trucking paid him \$900 a week, and various loans for the business were in his or his wife's name. He also testified that he personally owned many of the trucks used by the business.

The bookkeeper for Myers Trucking, Betty Fults, testified that Dwight Myers had always been involved in the business and that several of Myers Trucking's financial loans were in the name of Dwight Myers and his wife. Karen Hutchenson, President of Citizens Tri-County Bank in Altamont, Tennessee, also testified that various loans for Myers Trucking were in the name of Husband and his parents.

Coyle Clark, a Certified Public Accountant hired by Wife to evaluate Myers Trucking, testified that no partnership returns were ever filed and that he could not assign a value to Myers Trucking because of the mixed ownership of business assets and debts.

Wife testified that she had worked in the business from 2000 to 2002, writing checks and paying bills, and that she was responsible for obtaining business for the trucking company.

The trial court entered a Final Decree of Divorce on February 5, 2007, in which it found that both parties were entitled to a divorce on the ground of inappropriate marital conduct, and that the division of marital property was to be determined after the parties had submitted a proposed order to the court. The briefs indicate that both parties submitted proposed orders but they are not included in the record on appeal.

A Supplemental Decree was entered on June 26, 2007, that, *inter alia*, awarded Husband “the business known as Myers Trucking” and awarded Wife \$125,000 for her “marital interest” in the business, to be paid by Husband in five installments. The trial court also awarded Wife her automobile, all household goods and personal property currently in her possession, and ordered the costs to be divided equally between the parties. The trial court denied Wife’s request for alimony. This appeal followed.

ANALYSIS

When dividing the marital estate in a divorce, the trial court *must* first classify property as marital or separate. *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn. Ct. App. 2001). Tennessee is a “dual property” state, *Smith v. Smith*, 93 S.W.3d 871, 875-76 (Tenn. Ct. App. 2002), thus, it cannot be included in the marital estate unless it is “marital property.” The definition of that term is found in Tenn. Code Ann. § 36-4-121(b)(1)(A). “Separate property,” as that term is defined in Tenn. Code Ann. § 36-4-121(b)(2), is not marital property. Therefore, separate property should not be included in the marital estate. *Woods v. Woods*, No. M2002-01736-COA-R3-CV, 2005 WL 1651787, at *3 (Tenn. Ct. App. July 12, 2005). Property classification is a question of fact. *Mitts v. Mitts*, 39 S.W.3d 142, 144-45 (Tenn. Ct. App. 2000). Thus, we review the trial court’s classification using the familiar standard of review in Tenn. R. App. P. 13(d).

Once property has been classified as marital property, the court should place a reasonable value on property that is subject to division. *Edmisten v. Edmisten*, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *11 (Tenn. Ct. App. May 13, 2003). The parties have the burden to provide competent valuation evidence. *Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998). When valuation evidence is conflicting, the court may place a value on the property that is within the range of the values presented. *Watters v. Watters*, 959 S.W.2d 585, 589 (Tenn. Ct. App. 1997). Decisions regarding the value of marital property are questions of fact, *Kinard*, 986 S.W.2d at 231; thus, they are not second-guessed on appeal unless they are not supported by a preponderance of the evidence. *Smith*, 93 S.W.3d at 875.

Once the marital property has been valued, the trial court is to divide the marital property in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Miller*, 81 S.W.3d at 775. A division of marital property in an equitable manner does not require that the property be divided equally. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Dividing a marital estate is not a mechanical process but rather is guided by considering the factors in Tenn. Code Ann. § 36-4-121(c). *Kinard*, 986 S.W.2d at 230. Trial courts have wide latitude in fashioning an equitable division of marital property, *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983), and this court accords great weight to the trial court’s division of marital property. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). Thus, we defer to the trial court’s division of the marital estate unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994).

In the present case, the Final Decree of Divorce entered by the trial court “held in abeyance” the division of marital property “pending submission from each party a proposed Order of the disposition of the same.” However, neither of the proposed Orders are included in the record on appeal. The Supplemental Decree awarded a judgment in the amount of \$125,000 to Wife for her “marital interest” in Myers Trucking, but the court did not determine the value of the marital estate, which is dependent on whether Husband owns 100% or 50% of Myers Trucking and whether the business owns the disputed assets, including the commercial trucks used in the business.

The burden is on the parties to provide competent evidence concerning the marital estate, including the value of marital property, *see Kinard*, 986 S.W.2d at 231, and then it becomes the duty of the trial court to classify, value, and make an equitable distribution of the marital estate. *Miller*, 81 S.W.3d at 775. The record before us indicates the trial court failed to perform its duty in this regard. We fully recognize that the trial court’s inability to classify and determine the value of the marital estate and then to equitably distribute the marital estate may be impaired by the parties’ failure to present relevant and competent evidence; nevertheless, the court must classify, value and make an equitable distribution of the marital estate. In this case the marital property was not valued, which undermines the determination that it was equitable to award Wife \$125,000 for her marital interest in Myers Trucking.

Wife asks this court to determine the ownership of Myers Trucking and its assets, and to value and then equitably divide the marital estate. We have determined the record is wholly insufficient for this court to determine the ownership of Myers Trucking and the disputed assets and to value and equitably divide the marital estate because all we have before us is a modest statement of the evidence submitted by the parties that provides little evidence relevant to the disputed issues. The only evidence as to the value of Myers Trucking is the testimony of Husband concerning the gross income for Myers Trucking from 1999 to 2006, the testimony of CPA Coyle Clark that he could not assign a value to the business due to the “mixed ownership of business assets and debts,” the testimony of Myers Trucking’s bookkeeper that Myers Trucking loans were in the name of Husband’s parents as well as Husband, and the testimony of Husband’s father that several of the trucks operated by Myers Trucking were titled in Husband’s parents’ names.

When a trial court fails to apply the proper legal standard and omits necessary factual and legal analysis, it is often appropriate to remand the case to the trial court for reconsideration. *Raines v. Nat’l Health Corp.*, No. M2006-1280-COA-R3-CV, 2007 WL 4322063, at *7 (Tenn. Ct. App. Dec. 6, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n. 6 (1970); *Reynolds v. Giuliani*, 506 F.3d 183 (2d Cir. 2007); *First Tennessee Bank v. Hurdlock*, 816 S.W.2d 38, 40 (Tenn. Ct. App. 1991)). The Supreme Court in *Owens v. Nat’l Health Corp.*, 263 S.W.3d 876 (Tenn. 2007), faced such a situation when urged by a nursing facility to decide whether an arbitration agreement was unconscionable. Because the trial court’s ruling on the power of attorney’s authority pretermitted the issue of whether the nursing-home contract was a contract of adhesion and therefore unconscionable, the Supreme Court was urged by the nursing facility to decide the unconscionability issue without remand. *Owens*, 263 S.W.3d at 889. The Supreme Court stated that it was “unable to resolve the question of whether the arbitration agreement

is unconscionable due to the limited nature of the factual record,” and thus remanded the case to the trial court for further proceedings on that issue. *Id.*

The record before us is wholly inadequate for this court to determine these issues on appeal. For the reasons stated above, we vacate the judgment of the trial court as to the classification, value, and distribution of the marital estate. On remand, the burden is on the parties to provide relevant and competent evidence so the trial court may classify and value the marital estate and then make an equitable distribution of the marital estate based upon the evidence presented.

Wife also contends the trial court erred in failing to award alimony, including attorney's fees. Alimony decisions require a careful consideration of the relevant factors in Tenn. Code Ann. § 36-5-121(i) and typically hinge on the unique facts and circumstances of the case. *Oakes v. Oakes*, 235 S.W3d 152,160 (Tenn. Ct. App. 2007); *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998); *Crain v. Crain*, 925 S.W.2d 232, 233 (Tenn. Ct. App. 1996). Two of the most relevant facts are the obligor's ability to pay and the obligee's need. *Id.* Here, husband's ability to pay and Wife's need, if any, may be impacted by the trial court's determination as to the ownership of Myers Trucking, the value of the business, and the marital property awarded to Wife. Therefore, we also reverse the decision regarding alimony and remand the issue to the trial court for it to make a determination as to alimony after the marital estate has been properly divided.

IN CONCLUSION

The judgment of the trial court is vacated, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Husband.

FRANK G. CLEMENT, JR., JUDGE